IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1658

PACIFIC FAR EAST LINE, INC.,

Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION

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STATEMENT

The decision in this case should not be reviewed by the Court because:

(i) No clear conflict exists between the decision in this case and any rule of law arising from decisions in other circuits; (ii) the question decided in this case is of

importance only to the litigants in this case, and any rule which might be created by this case could only affect a set of circumstances likely to reoccur infrequently, if ever, in the future (any question which might be raised by the decision in this case relevant to the limitation provisions of COGSA and the Hague Rules would be within the purview of and would be very likely to be resolved by ongoing international conventions to which this country is participant); (iii) the decision properly interprets COGSA; and, (iv) the long-standing literal interpretation of that language of Section 4(5) of COGSA which pertains to "goods not shipped in packages" is the correct interpretation.

ARGUMENT

1-3. In seeking to create the appearance of a conflict between circuits petitioner relies entirely on the language of the district court below to the effect that respondent's position before that court was "a frontal assault upon the decision of the Second Circuit in the leading case of Aluminios Pozuelo Ltd. v. S.S. Navigator, 407 F.2d 152 (1968)" (Appendix B to Petition, page 13). But the district court's interpretation of respondent's position was not adopted by the court of appeals, which rejected both parties' reference to any "test" which might be disclosed by the decision in Aluminios

(Appendix A to Petition, page 10).

What the court of appeals did decide in this case is simply that this case is sui generis and should be decided on its particular facts.

A review of package limitation cases (Petition, pages 6-14; Appendix F to Petition) discloses that this "rule" is exactly what has prevailed in the Second and Fifth Circuits. All the cases show striking dissimilarities on their facts; all were decided on their particular facts. In Aluminios the object was a large, top-heavy press which simply could not travel (or even stand safely on the pier) without substantial packaging. In this case the object was a bulky transformer with its own "feet" for standing upon and its own "ears" by which it was intended to be lifted; it was clearly capable of traveling without its skid, a fact of which the court of appeals took note. (Appendix A to Petition, p. 2; 491 F.2d at 961)

Petitioner asserts that in this case and in Aluminios both courts of appeal "considered that they were deciding a question of law, not merely reviewing a finding of fact by the reviewing court." (Petition, p. 4.) This statement is not supported by the opinions. Moreover, both district courts treated the questions solely

as ones of fact.[1]

The decision in this case and that in Aluminios are not only reconcilable, as arising out of distinct fact situations, but are both so limited in application as to be properly left alone even if they had created a conflict.[2]

1/ "I find that the press on a skid is a 'package' . . ." Bonsal, J. 277 F. Supp. 1008 at 1010. In this case the question was decided by the district court as its Finding No. 12 (Appendix C to Petition, p. 19; 320 F. Supp. at 327).

2/ The subject of ocean carriers' liability limitation has been under consideration by various multi-national institutions including the International Chamber of Commerce, the Comité Maritime International and the United Nations Commission on International Trade Legislation. A resolution of virtually all future conflicts by virtue of a revised limitation based upon a uniform valuation "per kilo" rather than per package appears imminent. Ratification of the "Visby Amendment" protocol to the Brussel's Convention, which was signed by the United States February 23, 1968, would obtain such a result.

4. Petitioner's contention that all cargoes not shipped in bulk should be considered "packages" for the purpose of Section 4(5) of COGSA is itself a "frontal assault," not only on a very long line of decisions (two of which have brought up the issue on petitions for certiorari[3]), but upon the clearly expressed language and the manifest intent of the statute itself.[4]

Petitioner's argument is predicated on two demonstrably false premises: first, that Section 4(5) of COGSA must be interpreted as

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3/ Waterman S.S. Co. v. United States S.R. & M.Co., 155 F.2d 687 (5th Cir. 1946) cert. den. 329 U.S. 761; Gulf Italia Co. v. American Export Lines, 263 F.2d 135 (2d Cir. 1958) cert. den. 360 U.S. 902.

4/ The point was not raised either before the district court or the court of appeals. For this reason alone this Court should decline to consider it, particularly since no "miscarriage of justice" is even claimed and it is clear that none exists. Hormal v. Helvering (1941) 312 U.S. 552; Blair v. Osterlein Mach. Co. (1927) 275 U.S. 220; Safeway Stores, Inc. v. Okla. Retail Grocers Assn., Inc. (1959) 360 U.S. 334; United States v. N.Y. Tel. Co. (1946) 326 U.S. 638; Walters v. City of St. Louis (1954) 347 U.S. 231.

being in effect identical to Section 4(5) of the Hague Rules; and second, that in COGSA the word "package" has exactly the same meaning as the word "unit."

The answer to the first premise is simply that in enacting COGSA Congress intended to and did materially change Section 4(5), so that it is not the same provision as found in the Hague Rules. In The BILL, 55 F. Supp. 780 (D. Md., 1944), aff'd per curiam 145 F. 2d 470 (4th Cir., 1944), after tracing the history of COGSA, its genesis from the Hague Rules and the distinctions between the Act and the Rules, the court said:

> "But it will be noted that in the United States Act the phrase 'per unit' has been expanded or changed to read 'per customary freight unit.' There was considerable delay (1923-1936) before this country passed its Act. In the intervening years several successive Bills were introduced in which the phraseology of the limitation clause at times read '$100 per package or unit'; '$500 per package or, in case of goods not shipped in packages, per customary freight unit.' Various hearings were held on these several Bills over this period of years. During these hearings, or some of them,

other varying phraseology was suggested from time to time by interested parties including among other phrases 'per declared freight unit.' The final Bill which was subsequently passed was introduced on January 17, 1935 in the Senate (S. 1152) containing the phraseology '$500 per package, lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit.' (Italics supplied.) There appear to be no committee reports which clearly explain the quoted phrase 'per customary freight unit'; but it seems reasonably clear that the phraseology finally adopted was intended to be more definite than the shorter phrase 'per unit' contained in the Hague rules. (55 F. Supp. at p. 782.)"

In Falconbridge Nickel Mines v. Chimo Shipping [1973] 2 Lloyds Rep. 470 (a case cited and quoted at great length by Petitioner-Petition pp. 14-15, Appendix G to Petition, pp. 27-30) the Supreme Court of Canada interpreted The BILL as authority for holding that Section 4(5) of COGSA was so substantially changed from the same section of the Hague Rules (and the Canada Water Carriage of Goods Act, Sect. IV, r. 5 of which is identical to the Rules) as to be of no aid in the

interpretation of the section as it appears in the Rules and the Canada Act.

After reciting the above-quoted language from The BILL, Mr. Justice Ritchie said:

> "It is thus plain to me that it was only after considerable debate that the United States adopted the present form of their statute and I am satisfied that the words 'per package or, in case of goods not shipped in packages, per customary freight unit' do constitute a change from the Hague Rules as adopted in Great Britain and in Canada, and I do not think that they afforded any substantial guidance in the solution of the problem as to the meaning of the phrase 'per package or unit' as it occurs in art. IV, r. 5. [1973] 2 Lloyd's Rep. at p. 476."

Finally, in ratifying the Hague Rules convention the Senate made very specific its reservation:

> "that should any conflict arise between the provisions of the convention and the provisions of the act of April 16, 1936, known as the Carriage of Goods by Sea Act, the provisions of said act shall

prevail."

Petitioner's second premise is equally untenable: That any law making body (whether drafting in French or English) could be presumed to have used two different words in the disjunctive intending each to mean the same as the other is directly contrary to well settled rules of interpretation. Austin v. State of Maine (1964) 160 Me. 240, 202 A.2d 794, cert. den. 382 U.S. 1018 (1966). It is a cardinal rule of construction that no part of a statute may be presumed to be redundant. Stephen v. Cherokee Nation (1899) 174 U.S. 445; Nat'l Park Bank v. Remsen (1895) 158 U.S. 337; Caha v. United States (1894) 152 U.S. 211. Significance and effect should be given to every word. McDonald v. Thompson (1938) 305 U.S. 263, reh. den. 305 U.S. 676.

In COGSA the two distinct classes of things to which the package limit applies are not "colis" or "unites" but "packages" and "goods not in packages"; to the latter class the limitation applies "per customary freight unit," not "per unit."

CONCLUSION

Petitioner strains to create the appearance of a conflict, where in fact all that exists are different cases decided on different facts wherein each fact situation is

unlikely to ever arise again. Even if a similar set of facts should occur in the future it is likely that the situation would be covered by a substantially different law or contract terms.

The sophisticated argument, raised for the first time in the petition, that "package" means the same as "unit," and that "unit" means the same as "customary freight unit" is amply rebutted by the language itself as well as the clear intent of Congress to make COGSA distinct from the Hague Rules on the point.

Respondent respectfully urges that the petition for certiorari be denied.

Respectfully submitted,

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